MOTION FILED
JAN 20 1987

No. 86-1003 (3)

SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

THOMAS SALINAS, ET. AL.,
PETITIONERS

V.

ROADWAY EXPRESS, INC.,
ET. AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION TO ALLOW DAMAGES FOR DELAY

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1987

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STATUTES AND RULES INVOLVED

28 U.S.C. §1912

Damages and costs on affirmance

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Sup. Ct. Rule 17.

Considerations Governing Review on Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, tne United States Court of Military

Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Sup. Ct. Rule 49.

Interest and Damages

.1. Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment below was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the mandate shall contain instructions with respect to allowance of interest. Interest will be allowed at the same rate that similar judgments bear interest in the courts of the State where the judgment was entered or was directed to be entered.

.2. When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

TO THE HONORABLE UNITED STATES SUPREME COURT:

Now comes Roadway Express, Inc., Respondent herein, and files this its Motion to Allow Damages for Delay, and in support thereof would show the Court the following:

STATEMENT OF THE CASE

The Petitioners are 34 out of 122 member of the Plaintiffs' Class in this protracted Title VII litigation. Unhappy with the Consent Decree approved by the District Court and the Fifth Circuit, these 34 Petitioners have further delayed the receipt of benefits under the Consent Decree to the remaining 88 members of the Plaintiffs' Class while interest mounts daily at the rate of 10.5% against Respondent Roadway Express, Inc.

On September 20, 1985, the United States District Court for the Western District of Texas conducted a fairness hearing with regard to the Consent Decree

proposed in the case sub judice. On November 4, 1985, the District Court entered an order approving the Consent Decree and entered Findings of Fact and Conclusions of Law in support thereof. The objectors to the Consent Decree, the Petitioners herein, appealed to the United States Court of Appeals for the Fifth Circuit alleging that the Consent Decree was not fair, reasonable nor adequate. In light of the overwhelming evidence to the contrary, the Fifth Circuit affirmed the District Court's order approving the Decree. Salinas v. Roadway Express, Inc., 802 F.2d 787 (5th Cir. 1986).

On or about December 17, 1986, the Objectors filed their Petition for Writ of Certiorari to this Court. They urge, as a basis for the granting of certiorari, the overturning of this Court's decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

As this Court has noted in its rules, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with a decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or if a federal court of appeals.

> (c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

Sup. Ct. R. 17.1.

It is undisputed that the Petitioners do not seek to justify their request for writ of certiorari based upon the considerations set forth in Rule 17. Indeed, it is their plea to this Court, to overturn its long established and well-reasoned decision in International Brotherhood of Teamsters, supra, which underscores the frivolous nature of the petition.

The underlying motivation of this frivolous petition becomes only too clear when read in conjunction with the Consent Decree. The Consent Decree reads, in relevant part, as follows:

> "In lieu of any rate of interest, statutory or otherwise, which may accrue on any amounts to be paid pursuant to this Decree, interest at a rate of 10.5 percent per annum, **will begin to accrue only on the back-pay settlement amounts upon the filing of a notice of appeal and will accrue at such rate until said appeal is dismissed or a decision upholding this Decree is issued by the Court of final review considering said appeal.**"

See Petitioner's Appendix at page 77a. (Emphasis added). As such, the incentive for such a frivolous appeal becomes apparent in light of the financial gains to be reaped by the Petitioners. Interest above market rates of return, on the funds to be distributed to the Petitioners, mounts with each passing day, and the Petitioners are well aware of that fact. The delay occasioned by this frivolous appeal, has been disapproved by this Court in the past as its precedent makes clear.

ARGUMENT AND AUTHORITIES

Statutory guidance, in the form of 28 U.S.C. §1912, and rules promulgated by this Court, Sup. Ct. R. 49, make it clear that a party who frivolously appeals an issue, in bad faith and/or for purposes of delay, faces the possibility of damages. Tne imprimatur of this Court, to levy damages for the delay occasioned by such frivolous appeals, should stand as a signal to those who file such appeals. See, Amory v. Amory, et. al., 91 U.S. 356 (1875); Deming v. Carlisle Packing Company, 226 U.S. 102 (1912); Wagner Electric Mfg. Co. v. Lyndon, et. al., 262 U.S. 226 (1923); Slaker v. O'Connor, et. al., 278 U.S. 188 (1929); Mississippi Railroad Company, et. al. v. Smith, 299 U.S. 518 (1936); and, Tatum v. Regents of

the University of Nebraska-Lincoln, et. al., 462 U.S. 1117 (1983).[1]

Indeed, under 28 U.S.C. §1912 and/or Rule 38, Fed. R. App. P.,[2] the federal courts of appeals have sanctioned appellants who have appealed on frivolous grounds. See, In Re Continental Investment Corporation, 642 F.2d 1 (1st Cir. 1981); Muigai v. United States Immigration and Naturalization Service, 682 F.2d 334 (2nd Cir. 1982); Munroe Auto Equipment Company, Hartwell Division v.

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1. While the older cases make reference to Section 1010 of the Revised Statutes and Rule 23 of the 1859 Revision of the Court's Rules, 21 How xii, these statutes and/or rules were the progenitors of the Court's present sanctions against frivolous appeals. See, 13 MOORE'S FEDERAL PRACTICE, ¶849.01[1].

2. Rule 49.2, Sup. Ct. R., is the counterpart of Rule 38 of the Federal Rules of Appellate Procedure. 13 MOORE'S FEDERAL PRACTICE, ¶849.03.

NLRB, 511 F.2d 611 (5th Cir. 1975); Ruderer v. Fines, 614 F.2d 1128 (7th Cir. 1980); Oliver v. Mercy Medical Center, Inc., 695 F.2d 379 (9th Cir. 1982) and, United States v. Rayco, Inc., 616 F.2d 462 (10th Cir. 1980).

Under Rule 49, the damages permitted for frivolous appeals apply only to cases in which a money judgment has been entered by tne Court below. Sup. Ct. R. 49. In this regard, the Consent Decree represents and establishes a money judgment for those class members meeting certain criteria and conditions.

Even assuming arguendo, that the Consent Decree cannot be classified as a money judgment, this Court's power, to render damages for delay under 28 U.S.C. §1912, is not so limited. Chief Justice Taft confirmed that axiom in Wagner Electric Mfg. Co. v. Lyndon:

> An objection to allowing damages in the present case suggesting itself is that the **decree appealed from was not a money judgment.** It is true that this whole litigation in the federal jurisdiction has been initiated and carried on solely to secure the delay of the payment of a money judgment in the state court, but that is hardly within the exact terms of the 23rd Rule. Sections 1010 and 1012, Rev. Stat., are, however, not so restrictive **and they give this Court power to impose just damages of any judgment or decree, for delay.** Gibbs v. Diekma, 131 U.S. Appendix clxxxvi.[3]

262 U.S. 226, 223. (Emphasis added).

PRAYER FOR RELIEF

WHEREFORE, Respondent Roadway Express, Inc., respectfully prays that this Court assess as damages for delay, in the prosecution of Petitioner's

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3. In the Gibbs case, this Court noted that the predecessor statute to 28 U.S.C. §1912 gave the Court "authority to adjudge damages for delay on appeals as well as writs of error, and our power is not confined to money judgments above."

frivolous appeal, the staying of the interest accruing under the Consent Decree, as to these 34 Petitioners. Respondent also prays for such other and further relief, botn at law and in equity, to which it may show itself justly entitled.

Respectfully submitted,

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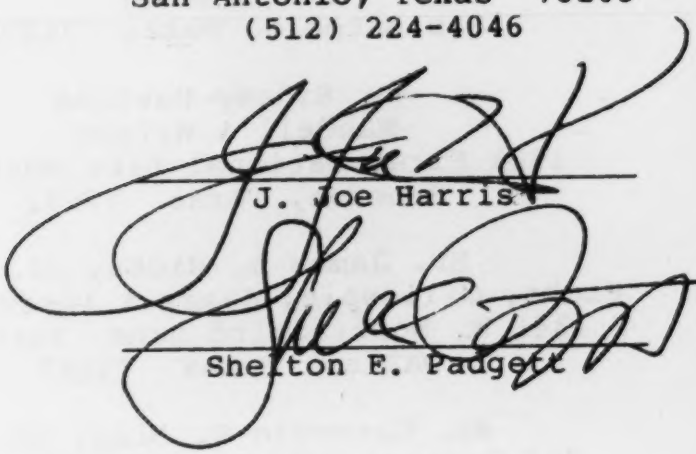

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Shelton E. Padgett

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was delivered by Certified Mail, Return Receipt Requested to:

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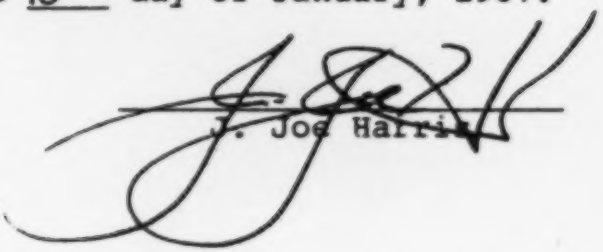

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